

## IN THE UNITED STATES DISTRICT COURT

## FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 FERNANDO GUIZAR, ) No. C 05-0557 MMC (PR)  
12 v. Plaintiff, ) **ORDER DENYING MOTION FOR  
13 BASSO AND POTTIEGER; DIRECTING  
14 CLERK TO ISSUE SUMMONS AND  
15 UNITED STATES MARSHAL TO  
16 SERVE DEFENDANTS COZIAHR,  
17 JAMES AND WOHLWEND  
18 Defendants. ) **(Docket No. 64)**  
19 \_\_\_\_\_ )**

20 This pro se prisoner matter has a lengthy procedural history. The facts relevant to the  
21 instant order can be summarized as follows: On February 7, 2005, plaintiff, a California  
22 prisoner currently incarcerated at Corcoran State Prison and proceeding pro se, filed the  
23 above-titled civil rights complaint pursuant to 42 U.S.C. § 1983. In the complaint, plaintiff  
24 alleges that prison officials at Salinas Valley State Prison, where plaintiff was incarcerated  
25 from July 18, 1996 to March 31, 1999, violated his constitutional rights by placing him in  
26 administrative segregation and, eventually, the secured housing unit, after he was validated  
27 as a gang member. In its Order of Partial Dismissal and Service, filed July 26, 2005, the  
28 Court found the complaint, liberally construed, stated cognizable claims, and ordered the  
complaint served upon twelve defendants.

1       The United States Marshal successfully served seven defendants (“the served  
2 defendants”), specifically, defendants Alameida, Alexander, Godfrey, Harris, Tingey,  
3 Virrueta and Woodford, and those defendants jointly filed a motion for summary judgment.  
4 In its Order Denying Defendants’ Motion for Summary Judgment, filed March 27, 2007, the  
5 Court (1) granted summary judgment on plaintiff’s claim that “some evidence” did not  
6 support his placement in administrative segregation, (2) denied summary judgment on  
7 plaintiff’s claim that he had been denied an adequate opportunity to present his views to the  
8 prison officials charged with deciding whether to place and retain him in administrative  
9 segregation, (3) denied summary judgment to supervisorial defendants Woodford and  
10 Alameida on plaintiff’s claim that said defendants had failed to adequately train and  
11 supervise the prison officials who made the decisions to place and retain plaintiff in  
12 administrative segregation, and (3) denied qualified immunity to all defendants.

13       Additionally, by that same order, the Court required plaintiff, within thirty days  
14 thereof, to either effectuate service on, or provide the Court with a current address for, the  
15 five unserved defendants, specifically, Coziahr, Basso, Wohlwend, Pottieger and James; the  
16 Court further advised plaintiff that if he failed to do so as to one or more of such defendants,  
17 his claims against any such defendant(s) would be dismissed without prejudice pursuant to  
18 Rule 4(m) of the Federal Rules of Civil Procedure.

19       Thereafter, the served defendants filed a notice of appeal of the order denying their  
20 motion for summary judgment on grounds of qualified immunity. Following the filing of  
21 said appeal, the Court granted defendants’ request to stay all proceedings pending a decision  
22 by the Ninth Circuit, including a stay of the deadline for plaintiff either to serve or provide  
23 the location of the unserved defendants.

24       Thereafter, the Ninth Circuit, in a Memorandum decision filed June 11, 2008, reversed  
25 the Court’s denial of qualified immunity with respect to defendant Virrueta. The Ninth  
26 Circuit affirmed, however, the denial of qualified immunity with respect to defendants  
27 Alameida, Alexander, Godfrey, Harris, Tingey and Woodford, finding a triable issue of fact  
28 existed as to whether plaintiff was afforded the opportunity to present his views to the prison

1 officials who had decided to place and retain him in administrative segregation, and the  
2 matter was remanded to this Court for further proceedings. Those defendants subsequently  
3 filed a motion to dismiss the claims against them, on the ground plaintiff had failed to  
4 exhaust his administrative remedies with respect thereto. By order filed February 8, 2010,  
5 the Court granted the motion to dismiss. By that same order, the Court reinstated its prior  
6 directive that plaintiff, to avoid dismissal of the five unserved defendants pursuant to Rule  
7 4(m), either himself effectuate service on them within thirty days or, within that same time  
8 period, provide the Court with a current address for them.

9 On February 22, 2010, plaintiff sent a letter to the Court providing service addresses  
10 for three of the five unserved defendants, specifically, defendants Coziahr, James and  
11 Wohlwend, and, on March 15, 2010, filed a notice of appeal of the Court's order dismissing  
12 his claims against the served defendants. Also on March 15, 2010, plaintiff filed a motion  
13 for a stay of all further proceedings pending resolution of the appeal. By order filed April 14,  
14 2010, the Ninth Circuit dismissed the appeal on the ground that the Court of Appeals lacked  
15 jurisdiction because the challenged order was not final or appealable; the mandate issued on  
16 May 6, 2010. (Docket Nos. 66, 68.)

17 Based on the above, plaintiff's motion to stay proceedings in this matter will be  
18 denied as moot.

19 Further, as plaintiff has failed either to serve or provide the Court with a current  
20 address for defendants Basso and Pottieger, those defendants will be dismissed from this  
21 action without prejudice pursuant to Rule 4(m). The United States Marshal will be directed  
22 to serve defendants Coziahr, James and Wohlwend at the addresses provided by plaintiff.

### 23 CONCLUSION

24 For the reasons stated above, the Court orders as follows:

25 1. Plaintiff's motion to stay proceedings pending appeal is hereby DENIED. (Docket  
26 No. 64.)

27 2. Defendants Basso and Pottieger are hereby DISMISSED from this action without  
28 prejudice under Rule 4(m).

1       3. The Clerk of the Court shall issue summons and the United States Marshal shall  
2 serve, without prepayment of fees, a copy of the complaint in this matter and all attachments  
3 thereto (Docket No. 1), and a copy of this order upon defendants Coziahr, James and  
4 Wohlwend at the addresses provided by plaintiff in Docket No. 60.

5       4. Within **ninety (90)** days of the date this order is filed, defendants shall file a  
6 motion for summary judgment or other dispositive motion with respect to the claims found to  
7 be cognizable above. **If defendants are of the opinion that this case cannot be resolved**  
8 **by summary judgment or other dispositive motion, defendants shall so inform the**  
9 **Court prior to the date the motion for summary judgment or other dispositive motion is**  
10 **due.**

11       5. The Court hereby extends the time to file an answer or waiver of answer, see 42  
12 U.S.C. § 1997e(g)(1), to a date to be set after the Court has ruled on the above-referenced  
13 motion or received notice that such a motion cannot be filed.

14       6. If defendants elect to file a motion to dismiss on the grounds plaintiff failed to  
15 exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a),  
16 defendants shall do so in an unenumerated Rule 12(b) motion pursuant to Wyatt v. Terhune,  
17 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied Alameida v. Terhune, 540 U.S. 810  
18 (2003).

19       7. Any motion for summary judgment shall be supported by adequate factual  
20 documentation and shall conform in all respects to Rule 56 of the Federal Rules of Civil  
21 Procedure.

22       8. Plaintiff's opposition to the dispositive motion shall be filed with the Court and  
23 served on defendants no later than **thirty (30)** days from the date defendants' motion is filed.

24           a. In the event defendants file an unenumerated motion to dismiss under Rule  
25 12(b), plaintiff is hereby cautioned as follows:<sup>1</sup>

---

27           <sup>1</sup>The following notice is adapted from the summary judgment notice to be given to pro  
28 se prisoners as set forth in Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc).  
See Wyatt v. Terhune, 315 F.3d at 1120 n.14.

1           The defendants have made a motion to dismiss pursuant to Rule 12(b) of  
 2 the Federal Rules of Civil Procedure, on the ground you have not exhausted  
 3 your administrative remedies. The motion will, if granted, result in the  
 4 dismissal of your case. When a party you are suing makes a motion to dismiss  
 5 for failure to exhaust, and that motion is properly supported by declarations (or  
 6 other sworn testimony) and/or documents, you may not simply rely on what  
 7 your complaint says. Instead, you must set out specific facts in declarations,  
 8 depositions, answers to interrogatories, or documents, that contradict the facts  
 9 shown in the defendant's declarations and documents and show that you have  
 10 in fact exhausted your claims. If you do not submit your own evidence in  
 11 opposition, the motion to dismiss, if appropriate, may be granted and the case  
 12 dismissed.

13           b. In the event defendants file a motion for summary judgment, the Ninth  
 14 Circuit has held that the following notice should be given to plaintiffs:

15           The defendants have made a motion for summary judgment by which  
 16 they seek to have your case dismissed. A motion for summary judgment under  
 17 Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

18           Rule 56 tells you what you must do in order to oppose a motion for  
 19 summary judgment. Generally, summary judgment must be granted when there  
 20 is no genuine issue of material fact--that is, if there is no real dispute about any  
 21 fact that would affect the result of your case, the party who asked for summary  
 22 judgment is entitled to judgment as a matter of law, which will end your case.  
 23 When a party you are suing makes a motion for summary judgment that is  
 24 properly supported by declarations (or other sworn testimony), you cannot  
 25 simply rely on what your complaint says. Instead, you must set out specific  
 26 facts in declarations, depositions, answers to interrogatories, or authenticated  
 27 documents, as provided in Rule 56(e), that contradict the facts shown in the  
 28 defendants' declarations and documents and show that there is a genuine issue  
 29 of material fact for trial. If you do not submit your own evidence in opposition,  
 30 summary judgment, if appropriate, may be entered against you. If summary  
 31 judgment is granted in favor of defendants, your case will be dismissed and  
 32 there will be no trial.

33           See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to  
 34 read Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v. Catrett, 477 U.S.  
 35 317 (1986) (holding party opposing summary judgment must come forward with evidence  
 36 showing triable issues of material fact on every essential element of his claim). Plaintiff is  
 37 cautioned that failure to file an opposition to defendants' motion for summary judgment may  
 38 be deemed to be a consent by plaintiff to the granting of the motion, and granting of  
 39 judgment against plaintiff without a trial. See Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir.  
 40 1995) (per curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

41           9. Defendants shall file a reply brief no later than **fifteen (15)** days after plaintiff's  
 42 opposition is filed.

1       10. The motion shall be deemed submitted as of the date the reply brief is due. No  
2 hearing will be held on the motion unless the Court so orders at a later date.

3       11. All communications by the plaintiff with the Court must be served on defendants,  
4 or defendants' counsel once counsel has been designated, by mailing a true copy of the  
5 document to defendants or defendants' counsel.

6       12. Discovery may be taken in accordance with the Federal Rules of Civil Procedure.  
7 No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local Rule 16-1 is  
8 required before the parties may conduct discovery.

9       13. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court  
10 informed of any change of address and must comply with the court's orders in a timely  
11 fashion. Failure to do so may result in the dismissal of this action for failure to prosecute  
12 pursuant to Federal Rule of Civil Procedure 41(b).

13       14. Any motion for an extension of time must be filed no later than the deadline  
14 sought to be extended and must be accompanied by a showing of good cause.

15       This order terminates Docket No. 64.

16       IT IS SO ORDERED.

17 DATED: May 21, 2010

  
MAXINE M. CHESNEY  
United States District Judge

18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28